

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

75-1041

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PMS.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
(CASE NO. 75-1041)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

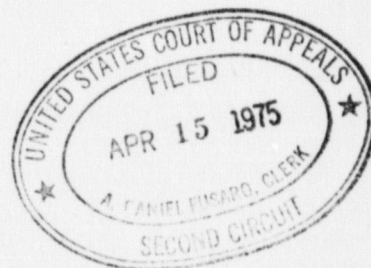
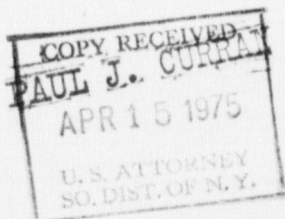
ALFRED LEAMOUS,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX FOR DEFENDANT-APPELLANT

H. HOWARD FRIEDMAN, ESQ.
Attorney for Defendant-
Appellant
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New York, New York 10017
212 MU 5-3646



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INDICTMENT
(COPY)

USA-33s-538-IND./INF.
Rev.5-27-72
N.F.:art

(Conspiracy to distribute and possess
with intent to distribute narcotic drug.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

-v-

ALFRED LEAMOUS,
BEAU RAY FLEMING,
JAMES BROWN,
LUCILLE TEZZANO,

INDICTMENT
74 Cr.46

Defendants.
-----X

The Grand Jury charges :

1. From on or about the 27th day of June, 1973,
and continuously thereafter up to and including the date of
the filing of this indictment, in the Southern District of
New York,

ALFRED LEAMOUS
BEAU RAY FLEMING
JAMES BROWN
LUCILLE TEZZANO

the defendants and others to the Grand Jury unknown, unlawfully,
intentionally and knowingly combined, conspired, confederated
and agreed together and with each other to violate Sections 812,
841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants
unlawfully, intentionally and knowingly would distribute Schedule 1
and 11 narcotic drug controlled substances the exact amount thereof
being to the Grand Jury unknown in violation of Sections 812,
841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

INDICTMENT

p. 2 - IND./INF. (Conspiracy to distribute and possess with intent to distribute narcotic drug.)

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On or about October 11, 1973, the defendant LUCILLE TEZZANO had a phone conversation with an undercover agent of the Drug Enforcement Administration.

2. On or about October 12, 1973, the defendant, JAMES BROWN, and defendant, LUCILLE TEZZANO, entered premises 125 West 96th Street, New York, New York.

3. On or about October 12, 1973, the defendant ALFRED LEAMOUS met with the defendant BEAU RAY FLEMING, at 125 West 96th Street, New York, New York

(Title 21, United States Code, 846)

IND/INF - Distrib. Possess Narc. Drug (Succeeding Count)

SECOND COUNT

The Grand Jury further charges:

On or about the 12th day of October, 1973, in the Southern District of New York,

ALFRED LEAMOUS
BEAU RAY FLEMING
JAMES BROWN
LUCILLE TEZZANO,

the defendants, unlawfully, intentionally and knowingly did

distribute and possess with intent to distribute a Schedule 11
narcotic drug controlled substance, to wit, approximately
67 grams of cocaine hydrochloride.

(Title 21, United States Code, Sections 812,
841(a)(1) and 841 (b)(1)(A).)

Foreman

PAUL J. CURRAN
United States Attorney

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because of friendship between alleged co-conspirators.

THE COURT: I will charge that in substance.

MR. BRILL: Would your Honor charge, in connection with the decision, U. S. against Santore , participation in a single isolated transaction was an insufficient basis upon which to bottom an inference to continued participation in a conspiracy?

THE COURT: I will charge that, in substance.

MR. BRILL: Thank you, your Honor.

[Jury present.]

THE COURT: The Court and the jury have different functions. It is my function and duty at this stage of the trial to instruct you on the law that applies to this case and it is your duty to accept the law as I give it to you, whether or not you agree with it, and to apply that law to the facts as you find them.

In short, I am the exclusive judge of the law.

Now, you are the exclusive judges of the facts. You and you alone decide what happened here.

Where does the truth lie?

You decide what weight, what effect and what value you give to the evidence and any inferences to be drawn from the evidence. You decide whether or not to believe a witness, and, of course, ultimately you decide

CHARGE

the guilt or innocence of each of these defendants on trial in this case.

Now, you are not to conclude from any rulings that I have made throughout this trial or any questions that I may have asked that I have any opinion one way or the other as to the guilt or innocence of either of these defendants. That decision is exclusively up to you.

How do you go about finding the facts? Finding the facts is merely a process by which you, the jury, consider the exhibits which have been received in evidence and the testimony that you heard from the witness stand. Sift out what you believe. Weigh it in the scale of your reasoning powers and common sense and draw such conclusions as your experience and good judgment tell you that the evidence supports and justified, and decide just where the truth lies in this case.

Now, in this connection, all evidence is of two general types, direct evidence and circumstantial evidence. Evidence is direct when the facts are shown by exhibits which are admitted into evidence or when sworn to by witnesses who have actual knowledge of them, from something they have seen or heard or some knowledge that they gain through the exercise of one of their five fundamental senses.

Circumstantial evidence simply means drawing a logical inference or conclusion from other connected facts that have been seen or heard.

The classic example of circumstantial evidence is Robinson Crusoe's seeing the footprint on the sand. He had no direct evidence that another man was on the island. He hadn't seen anyone else on the island, if you will remember. He hadn't heard any other man on the island. But it was obvious from the footprint and from the fact that he knew it wasn't his that there was another man on the island.

You are all familiar with this process of drawing conclusions from other facts, conclusions which your common sense tells you must be so.

Now, no greater degree of certainty is required when evidence is circumstantial than when it is direct. For in either case you must be convinced beyond a reasonable doubt before you can find any defendant guilty.

Now, it is your memory of the evidence that controls. It is not the way I remember it and it is not the way counsel remember it. If your memory squares with the lawyers' memory as they were reciting their version of the evidence to you in their closing arguments, you may accept their version. But to the extent that you have a different recollection, you are bound by your oath to rely on your own

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memory.

In this connection, sometimes juries are out only a little while, then they send me a note, "We want all the testimony of this witness or that witness."

Now, if you really need that testimony, I will have the Court Reporter read it back to you, but bear in mind that before you do that, you ought to try to exhaust each other's memory of the evidence. If you can't remember it, maybe one of your fellow jurors can help you to, but if in the end you really feel that you need to have some testimony reread, have your Foreman send me a note and specify what you want, because it takes us a little time to find it, and you must hear it on both direct and on cross-examination.

So, I would ask you to use restraint in that. In these days of television, juries sometimes get in the habit of doing it the way it is done on TV, and here we are dealing with the real world.

One of your most important functions is to determine just where the truth lies. It is your exclusive function to decide which witnesses you will believe. And this is so as to every witness, whether called by the Government or called by the defense.

You are not to be influenced by the number of witnesses called by either side or by the number of exhibits

received in evidence. You are concerned not with the quantity, but with the quality of the evidence.

The first test which you should apply in determining the trustworthiness of the witness is to measure what he says against your plain everyday common sense. You are not bound to believe unreasonable statements or to accept testimony that defies your common sense or worse insults your intelligence just because the statements are made in sworn testimony on the witness stand in a courtroom.

You saw the witnesses in this case. In deciding whether to believe a witness you should consider his conduct and his manner on the stand.

I saw you watching these witnesses with particular care as they were testifying. How did the witness impress you? Was he being frank with you? Was the witness evasive? Did his version of the facts appear to be straightforward? Did he try to conceal some of the facts? Was he just parroting answers? Did he have any motive to testify falsely? Is he interested in the outcome of this case? How strong or weak was his memory of important events?

In short, can you rely on him? Can you trust him? Did he show any bias or prejudice to either side?

You ought to consider also his opportunity to know the facts about which he testified and the probability

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2 or improbability of what he said.

3 How does his testimony add up when considered
4 with all of the other evidence?

5 Are there any inconsistencies in his testimony?
6 And if so, how important are they?

7 Has he made any inconsistent statement on some
8 prior occasion? And if so, how important are those
9 inconsistencies?

10 There has been testimony here by two witnesses
11 this morning as to the previous good reputation of the
12 defendant Fleming. You should consider such evidence of
13 good reputation, including the testimony of those witnesses
14 on cross-examination, together with all the other evidence
15 in determining the guilt of the defendant Fleming.

16 Evidence of good reputation may, in itself,
17 create a reasonable doubt where without such evidence no
18 reasonable doubt would exist. But if from all the evidence,
19 including the evidence of good reputation, you are satisfied
20 beyond a reasonable doubt that the defendant is guilty,
21 a showing that he previously enjoyed a good reputation
22 does not justify or excuse the offense, and you should not
23 acquit him merely because you might find that he had been
24 a person of good repute.

25 The testimony of a reputation witness is not to

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2 be regarded by you as expressing the witness' personal
3 opinion of the defendant's reputation or of his guilt or
4 innocence in this case. That, of course, is a question
5 which is entirely up to you and you alone to determine.

6 James Brown testified here that he knowingly
7 participated in the conspiracy and in the other crime charged
8 here. If you believe that, then he was an accomplice, and
9 you should consider the fact that he was an accomplice in
10 testing his credibility and in weighing the value of his
11 testimony.

12 Obviously a witness is not incapable of telling
13 the truth about what occurred because he is an accomplice,
14 but you must examine his testimony with special care and
15 act upon it with caution.

16 In the prosecution of crime, the Government is
17 frequently called upon to use persons who are accomplices.
18 Often it has no choice. They are properly used. After all,
19 the Government must rely upon witnesses to transactions,
20 whoever they are, otherwise in many instances it would be
21 difficult to detect and to prosecute wrongdoers, and this
22 is particularly so in cases of conspiracy.

23 Frequently it happens that only those on the
24 inside of the scheme can give evidence which is material
25 and important to the case.

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2 Now, there is no requirement that the testimony
3 of an accomplice be corroborated, that is, that it be
4 supported or backed up by other evidence. Conviction may
5 rest upon the testimony of an accomplice like Brown alone,
6 if you believe it.

7 The credibility of James Brown, like that of all
8 the witnesses, is for you and you alone to determine, taking
9 into account, of course, the interest of the witness, his
10 motive, any inducement or consideration he may have received
11 or hopes to receive from the Government, any hostility he
12 may bear toward any defendant, any other evidence you recall
13 which may reasonably be considered to influence and color
14 his testimony.

15 The defendant Leamous did not take the stand.
16 A defendant is not required to take the stand and testify
17 in his own behalf. He has no burden of proof to sustain
18 in this case.

19 He has denied the charges made against him by
20 his plea of not guilty, and he is presumed to be innocent.

21 The fact that he has not testified cannot be taken
22 into consideration by you in any manner. You may not permit
23 that fact to weigh in the slightest degree against the
24 defendant nor should that fact enter into your deliberations
25 in any way.

2 Now, the defendant Fleming did testify as a
3 witness. He was not required by law to do so, and his
4 appearance as a witness was entirely voluntary. If he had
5 not testified, his failure to do so could not have been
6 considered by you in any manner in determining his guilt or
7 innocence. But having chosen to testify, the law requires
8 that his testimony be judged and appraised by the same
9 standards applied to the testimony of any other witness,
10 giving consideration, of course, to his background, to his
11 personality and to his natural interest in the outcome of
12 this trial.

13 If you find that any witness has deliberately
14 and willfully lied with respect to any material fact in his
15 or her testimony offered at this trial, you may follow either
16 one of two courses. You may accept as much of the witness'
17 testimony as you believe or you may reject, if you wish,
18 his or her entire testimony.

19 Before discussing the crimes charged here, I want
20 to remind you that an indictment is a mere accusation.
21 It is not evidence of the truth of the charge made and you
22 are to draw no inference of guilt from the mere fact that
23 these defendants have been indicted.

24 As I told you at the outset, an indictment simply
25 means that a defendant has been accused of a crime. Each

2 defendant has denied the charge made against him here. No
3 defendant has any burden of proof to sustain in this case.
4 He is under no obligation to produce any witnesses. He is
5 presumed to be innocent, and this presumption of innocence
6 continues throughout the trial and during the deliberations
7 of the jury. This presumption of innocence is overcome
8 when and only when the Government establishes the guilt of
9 a defendant beyond a reasonable doubt.

10 Now, what do I mean by beyond a reasonable doubt?
11 As the phrase implies, a reasonable doubt is a doubt that
12 is based upon reason, a reason which appears in the evidence
13 or in the lack of evidence.

14 It is not some vague, speculative, imaginary
15 doubt, nor a doubt based upon emotion or sympathy or
16 prejudice or upon what some juror might regard as an
17 unpleasant duty.

18 The Government is not required to prove a defendant
19 guilty beyond every possible doubt, nor to an absolute or
20 mathematical certainty, because such measure of proof is
21 usually impossible in human affairs.

22 You should review all of the evidence as you
23 remember it, sift out what you believe, discuss it, analyze,
24 weigh and compare your view of the evidence with that of
25 your fellow jurors.

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2 If that process produces a solemn belief or
3 conviction in your mind, such as you would be willing to act
4 upon without hesitation if this were an important matter of
5 your own, then you have been convinced beyond a reasonable
6 doubt.

7 On the other hand, if your mind is wavering
8 or so uncertain that you would hesitate before acting if
9 this were an important matter of your own, then you have not
10 been convinced beyond a reasonable doubt and you must render
11 a verdict of not guilty.

12 The indictment in this case contains two counts.
13 Each of these counts charges a separate offense or crime,
14 and each must be considered separately, and I will send in
15 a copy of the indictment so that you will have it before
16 you when you deliberate.

17 The indictment names four defendants. Only two
18 are on trial before you, Beau Ray Fleming and Alfred Leamous.
19 They are the persons whose guilt or innocence you must
20 announce in your verdict, although, as I will explain to you
21 shortly, in considering whether they are guilty you may
22 have to determine the nature of the participation, if any,
23 of other persons, here, for example, Lucille Tezzano and
24 James Brown.

25 In the determination of innocence or guilt, you

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2 must bear in mind that guilt is personal. There is no
3 such thing under our system of justice as guilt by mere
4 association. The guilt or innocence of a defendant on
5 trial before you must be determined separately with
6 respect to him solely on the evidence presented against him
7 or on the lack of evidence.

8 Let us turn to the specific charges against the
9 defendants. The first count of the indictment charges
10 a conspiracy. It charges that Alfred Leamous, Beau Ray
11 Fleming, James Brown and Lucille Texxano, together and with
12 others to the Grand Jury unknown, conspired to violate the
13 Federal Narcotics laws.

14 I shall refer to this first count as the con-
15 spiracy count.

16 In order to convict a defendant on Count One,
17 the Government must prove to your satisfaction, beyond a
18 reasonable doubt, each of the following facts:

19 (1). The existence of a conspiracy from on or
20 about June 27th, 1973, and continuously thereafter up to
21 and including the date of the filing of this indictment,
22 January 17, 1974, knowingly and intentionally to distribute
23 cocaine or to possess cocaine with an intent to distribute it.

24 Fact One, the existence of the conspiracy charged
25 in the indictment.

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2 (2). That a defendant knowingly joined the
3 conspiracy with knowledge of its unlawful purpose.

4 Fact Two, that the defendant joined the conspiracy
5 knowing of its purpose.

6 (3). That any one of the conspirators committed
7 at least one overt act in furtherance of the conspiracy.

8 That one of the conspirators committed an overt
9 act in furtherance of the conspiracy.

10 Now, I will explain what these elements mean.

11 The first fact of the crime is the existence of
12 the conspiracy. Now, what is a conspiracy? A conspiracy,
13 for our purpose, is simply a combination, an agreement or
14 contract, knowingly made by two or more people to commit a
15 crime, here an agreement to deal in narcotics. Thus, a
16 conspiracy is a kind of a partnership in criminal purposes.
17 This does not mean that two or more persons must meet and
18 sign a formal partnership agreement or a written contract
19 or that they must sit down and agree in so many words on
20 what their unlawful scheme is to be or how they are going to
21 carry it out.

22 When persons enter into a combination or
23 agreement to commit a crime, much is left to implication and
24 to tacit understanding. Conspirators do not proclaim their
25 unlawful plans or publicly announce their criminal purposes.

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2 The very nature of a criminal conspiracy usually calls for
3 secrecy and intrigue.

4 The first element is satisfied, therefore, if
5 you find beyond a reasonable doubt that any two or more
6 people, in any way, intentionally combined or agreed to a
7 common plan, knowingly and intentionally to distribute
8 cocaine or to possess cocaine with an intent to distribute it.

44 Now, in determining whether there was such a
9 combination, understanding or agreement here, you should
10 consider all the evidence about each defendant's conduct,
11 acts and statements. You should consider not only what he
12 said or did, but also the way he said or did it.

13 Actions speak louder than words. You should
14 therefore ask yourself whether transactions were conducted
15 in a simple, straightforward manner, as innocent business
16 transactions are, or whether they were purposely made
17 secretive, circuitous and devious; whether the meetings
18 were open or secret; whether the persons involved concealed
19 or tried to conceal their identities in any way; whether
20 they dealt in cash and currency; and any other evidence
21 which you recall and believe as to the manner in which
22 a defendant conducted his affairs, and whether his dealings
23 were open and above board or whether they were surrounded
24 by that secrecy and intrigue which are the hallmark of a
25

conspiracy.

From the point of view of the law, there is danger to the public when two or more people combine to do something that is unlawful. The danger is greater than if the lone criminal acts by himself because two or more people are able to accomplish crimes that are more difficult and harmful to the community.

Because of this, a conspiracy to commit a crime is a distinct crime in and of itself, separate and apart from the crime which it is the object of the conspiracy to accomplish.

Thus, a conspiracy may be found to exist although the purpose of the conspiracy is never accomplished.

Here, for example, there never need be any distribution of cocaine or any possession of cocaine with an intent to distribute it. It is enough that there was an agreement to deal in it.

The agreement itself is the gist of the crime, the agreement to commit the crime.

Proof, however, of the accomplishment of the purpose of the conspiracy -- in other words, the commission of the crime -- is the most persuasive evidence of the existence of the conspiracy itself.

Now, the period of time charged in the indictment

here runs from on or about June 27th, 1973, and continuously thereafter up to and including the 17th day of January 1974.

It is not necessary for the Government to prove that the conspiracy alleged started and ended on those specific dates. It is sufficient if you find that a conspiracy was formed and that it existed for some substantial time within the period set forth in the indictment.

You will recall that the second element which the Government is required to prove beyond a reasonable doubt is that a defendant joined the conspiracy with knowledge of its purpose and knowing that its purpose here was knowingly to distribute cocaine or to possess cocaine with an intent to distribute it.

When I say joined the conspiracy, I don't mean that a defendant has to file some kind of an application for membership. However, before one can be found to be a member of a conspiracy, he must know of the existence of the conspiracy, that is, he must know that two or more people have combined to commit a crime, and he must know of its unlawful purpose here to distribute cocaine or possess it with intent to distribute it, and he must voluntarily and knowingly join in the criminal venture with an intent to combine with others in violating the law. He must knowingly promote the scheme or have a stake in its outcome.

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2 You will note that I have said that a defendant
3 must have acted knowingly and intentionally. Now, this
4 does not mean that a defendant must be aware that his conduct
5 violates Section 812, 841(a) (1), Section 841(b) (1) (A) of
6 Title 21, United States Code, as alleged in the indictment.

7 It simply means that he must know what he is
8 doing, that he was acting freely and voluntarily and
9 deliberately and on purpose, and not because of mistake,
10 accident, carelessness or other innocent reason.

11 Here again, in determining knowledge and intent,
12 it is obviously impossible to look into a defendant's mind.
13 However, knowledge and intent may be inferred from the way
14 a defendant acts, by his statements and all the surrounding
15 statements.

16 Thus, the adage, actions speak louder than words,
17 also applies here.

18 The mere fact, however, that a defendant may
19 witness a crime or be present when a crime is committed by
20 others or that he attends meetings or that he unwittingly
21 assists the venture or associates or has a friendship or
22 even one transaction in narcotics with a member of a
23 conspiracy is not in itself enough to make him a conspirator
24 unless you first find beyond a reasonable doubt that he knew
25 of the conspiracy and that he intentionally joined with the

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2 knowledge of its unlawful purpose and with a stake in its
3 success.

4 Now, one may become a member of a conspiracy
5 without knowledge of all of the details or all of the
6 operations of the conspiracy. One defendant may know only
7 one other member of the conspiracy. Yet, if he knowingly
8 cooperates to further the illegal purpose of the conspiracy,
9 with knowledge that others have combined to violate the
10 law, he becomes a member, although his role may be only
11 insignificant or subordinate.

12 If you find that a defendant did join the
13 conspiracy with knowledge of its illegal purpose, then he
14 is bound by what others say and do to promote or further
15 the crime, even though he himself is not present.

16 Each conspirator is the agent or partner of every
17 other conspirator. What one does to promote the illegal
18 plan or the illegal agreement binds every other member of
19 the conspiracy.

20 You will recall that the third element of the
21 crime of conspiracy is the commission by any conspirator
22 of at least one overt act in furtherance of the object
23 of the conspiracy. Overt act means an act by any member
24 of the conspiracy in an effort to accomplish some purpose
25 of the conspiracy. The reason the law of conspiracy

1 requires an overt act is because a person might agree to
2 commit a crime and then change his mind. Therefore, before
3 a defendant can be convicted of a conspiracy, one or more
4 of the conspirators must have taken at least one step or
5 performed one single act which moved directly toward carrying
6 out the unlawful intent to commit the crime.
7

45 8 The Government has alleged three overt acts and
9 you will note, upon reading the indictment, which I will
10 send in to you, that some of these are acts innocent in and
11 of themselves. Nevertheless, if those acts were performed
12 by any member of the conspiracy during the existence of the
13 conspiracy and in furtherance of its purpose, then those
14 acts are sufficient to satisfy the third element.

15 The Government is not required to prove that all
16 three overt acts were committed. It is enough if the
17 Government proves beyond a reasonable doubt that at least
18 one of the overt acts was committed in furtherance of the
19 purposes of the conspiracy by any one or more members of
20 the conspiracy, whether or not the member committing the
21 act is a defendant on trial.

22 Now, you must consider each defendant separately.
23 If you find that the Government has failed to prove beyond
24 a reasonable doubt all three elements of the crime of
25 conspiracy as I have defined them, then you must acquit the

defendant whom you are considering on that count.

On the other hand, if you find that the Government has proved beyond a reasonable doubt that a conspiracy existed from on or about June 27th, 1973, continuously up to and including January 17, 1974, knowingly and intentionally to distribute cocaine or to possess cocaine with an intent to distribute it, that the defendant whom you are considering knowingly joined the conspiracy with knowledge of its unlawful purpose, and that any one of the conspirators committed at least one overt act as charged in the indictment, in furtherance of the conspiracy, then you should convict that defendant on Count One.

The second count of the indictment charges the defendants with actually distributing cocaine and actually possessing cocaine with an intent to distribute it.

Here again, you must consider each defendant separately and before you can find any defendant guilty on Count Two, the Government must prove to your satisfaction beyond a reasonable doubt each of the following elements:

(1). That on or about October 12, 1973, the defendant either distributed cocaine or possessed cocaine with an intent to distribute it.

While Count Two alleges both distribution of cocaine and possession of cocaine with an intent to

distribute it, the Government is not required to prove both.

The first element is satisfied if you find that the defendant either intentionally distributed or sold cocaine or knowingly possessed cocaine with an intent to distribute it.

The word "distribute" means the actual, constructive, or attempted transfer of the drug. The word "possession" means either actual physical possession of the cocaine or such a control of the drug that the defendant could move it himself or cause others to move it at his direction. This is what is known as constructive possession.

And the word "intent" refers to a person's state of mind.

So then, possess with intent to distribute means to control a narcotic drug with a state of mind or purpose to transfer it.

The second element is that the substance which was distributed or possessed with intent to distribute was in fact cocaine.

This second element is satisfied if you believe the testimony, by stipulation, to the effect that if a chemist were called he would testify that the contents of Exhibit 1-B is cocaine.

The third element is that in distributing cocaine

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2 or in possessing cocaine with an intent to distribute it,
3 the defendant acted knowingly and willfully.

4 As to the third element, you should consider
5 and apply all that I have previously charged you on the
6 subject of what constitutes knowledge and intent in the
7 participation of a crime.

8 Moreover, as to Count Two, it is not necessary
9 for the Government to show that the defendant whom you are
10 considering actually distributed or possessed cocaine with
11 an intent to distribute the cocaine himself.

12 The law provides that a person who aids and abets
13 another, that is, somebody who helps another to commit a
14 crime is just as guilty of that crime as if he had committed
15 it himself.

16 Accordingly, you may find a defendant whom you
17 are considering guilty of the crime charged in Count Two
18 if you find beyond a reasonable doubt that that defendant
19 aided and abetted some other person in the commission of
20 the crime charged in that count.

21 Here the Government contends that each of the
22 defendants now on trial aided and abetted Lucille Tezzano
23 in committing the crime of distributing cocaine and of
24 possessing cocaine with an intent to distribute it.

25 Before you can convict a defendant for aiding and

1 abetting, however, you must find that someone else did in fact
2 commit the crime -- here, for example, Lucille Tezzano -- and
3 that the defendant consciously associated himself with a crimin-
4 al venture with an intent that his conduct would help it succeed.

5 You must be convinced beyond a reasonable doubt that
6 he was doing something to aid the crime or to forward the crime
7 of the other person, that he was a conscious, knowing participant
8 in the crime with a stake in its success rather than a mere wit-
9 ness, spectator or bystander on the scene of a crime committed
10 by another.

11 After considering all the evidence, if you find, as
12 to the defendant whom you are considering, that the Government
13 has failed to prove beyond a reasonable doubt all three elements
14 of the crime as I have defined them, or that he aided and
15 abetted Lucille Texxano in committing the crime, then you must
16 acquit that defendant.

17 On the other hand, if you find that the Government has
18 proved beyond a reasonable doubt each of the elements of the
19 crime alleged in Count Two as I have defined them, or that the
20 defendant aided and abetted Lucille Tezzano in committing the
21 crime, then you should convict that defendant.

22 Now, you are instructed that the question of possible
23 punishment of the defendant in the event of a conviction is no
24 concern of yours and it should not in any sense enter into or
25 influence your deliberations.

 The duty of imposing sentence in the event of a

conviction rests exclusively upon the Court. The function of the jury is to weigh the evidence in the case and determine the guilt or innocence of the defendant solely upon the basis of such evidence.

When you retire to the jury room, treat each other with consideration and respect, as I know you will. If differences of opinion arise, discussion should be dignified, calm, intelligent.

Your verdict must be based on the evidence and the law, the evidence which was presented in this case, as you remember it, and the law as I have given it to you in this charge.

You are each entitled to your own opinion. No juror should acquiesce in a verdict against his individual conscientious judgment. Nevertheless, I would point out that no one should enter a jury room with such pride of opinion that he would refuse to change his mind no matter how convincing or intelligent the argument on the part of another juror or jurors.

Discussion and deliberation are part of our jury process, and your deliberations should be approached in that spirit. Jury deliberation is jury discussion. Talk out your differences. Each of you should, in effect, decide the case for himself or herself, after thoroughly

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2 reviewing the evidence and frankly discussing it with your
3 fellow jurors, with an open mind, and with a desire to reach
4 a verdict. If you do that, you will be acting in the true
5 democratic process of the American jury system.

6 There are twelve of you on this jury. The
7 alternates will be excused with the thanks of the Court
8 before you retire for your deliberations.

9 Any verdict must be the unanimous verdict of
10 all of you as to each defendant on each count, and it must
11 represent the honest conclusion of each of you.

12 I submit the case to you with every confidence
13 that you will fully measure up to the oath which you took
14 as members of the jury, to decide the issues submitted to
15 you fairly and impartially, on the basis of the law and
16 the evidence, and without fear or favor.

17 Now, members of the jury, if you find that the
18 Government has failed to establish the guilt of a defendant
19 beyond a reasonable doubt, you should acquit him. If you
20 find that a defendant has not violated the law, you should
21 not hesitate for any reason to render a verdict of not
22 guilty as to that defendant.

23 But, on the other hand, if you find that the
24 Government has established the guilt of a defendant beyond
25 a reasonable doubt, you should not hesitate because of

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2 sympathy or any other reason to render a verdict of guilty.

3 Your Foreman will return an oral verdict in
4 open court of either guilty or not guilty as to each
5 defendant on each count.

6 Are there any exceptions, gentlemen? If so, I
7 will hear you at the side bar.

8 MR. FIGUEROA: None by the Government.

9 MR. BRILL: No exceptions. I have several
10 requests, your Honor.

11 THE COURT: I will hear you. I think your
12 requests come a little late, Mr. Brill.

13 MR. WEISS: If your Honor please, I have no
14 exceptions.

15 [Side bar.]

16 MR. BRILL: I respectfully ask your Honor to
17 charge the jury that if the jury believes Brown when he
18 testified on cross-examination that he did not see any
19 money pass from Miss Tezzano to Alfred Leamous, they must
20 acquit.

21 THE COURT: I decline to do that.

22 MR. BRILL: I respectfully ask your Honor to
23 charge the jury that if they believe the testimony of Brown
24 on cross-examination that he heard no conversation regarding
25 drugs, saw nothing which would indicate the passing of drugs,

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they must acquit.

THE COURT: Denied.

MR. BRILL: Exception.

[Open court.]

[Marshal sworn.]

THE COURT: All right, you may retire for your deliberations. Take them to lunch right away. Don't talk about the case during lunch. Wait until you come back to deliberate.

The alternates are excused with the thanks of the Court. The alternates will not go to lunch, I'm sorry to say.

[Alternates excused.]

[Jury left the courtroom at 12:45 o'clock p.m.]

[Jury went out to lunch at one o'clock p.m. and returned to the jury room at 2:05 o'clock p.m.]

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1 jkbr 11

2 (Jury present.)

3 THE COURT: You will probably notice that
4 Mr. Leamous isn't here this morning. You are to draw no
5 inference against him or the other defendant because
6 Mr. Leamous is absent.

7 I have your note asking for a clarification of
8 the conspiracy count.

9 "2. Clarification of the possession count.

10 "3. As far as this case is concerned, can
11 either defendant be convicted of conspiracy and not of
12 possession?"

13 I think that it should help to clarify if I
14 simply read the facts which the government must prove, the
15 three facts which the government must prove in order to
16 establish a conspiracy and, of course, the government must
17 prove them beyond a reasonable doubt, as I defined that
18 term to you yesterday.

19 One is that there was a conspiracy in existence
20 for the period mentioned in the indictment.

21 And, as I told you, there is nothing complicated
22 about a conspiracy. It is simply an agreement or an
23 understanding between two or more people.

24 For example, if one of you and I have agreed
25 to rob a bank, we have got an illegal agreement, conspiracy.

1 jkbr 12

2 And now, if another one of you knows about that
3 agreement and joins in it, knowing that we've got that
4 agreement, gets in on that agreement, in on that deal, he
5 becomes a member of that conspiracy, but in order to
6 convict him, in order to establish the crime, the government
7 has a third thing to prove. It has to prove that somebody
8 took a step, a single step of any kind -- it could be an
9 innocent step -- toward carrying out the illegal agree-
10 ment.

11 Here, for example, one of the steps alleged in
12 the indictment is that on or about October 11, 1973, the
13 defendant Lucille Tezzano, had a phone conversation with
14 an undercover agent of the Drug Enforcement Administration.

15 Now, you have heard that phone conversation and
16 if that phone conversation was in furtherance of the
17 purposes of this conspiracy -- which, of course, was to get
18 some cocaine, to sell it, to possess it and to distribute
19 it; that is what the government contends; that is what this
20 conversation would seem to indicate -- and if that was in
21 furtherance of that illegal plan, that is an overt act.
22 It doesn't matter, the telephone conversation could even
23 have been innocent, but if it was in furtherance of the
24 object of the conspiracy, that's it.

25 So, to recapitulate it now again, there must be

an illegal agreement between any two people, whether or not they are the two people on trial here.

For example, the agreement here can be between Tezzano and Brown, if you find that is so.

Then the next question is -- before you can convict any defendant, he must join in that agreement, he must join the conspiracy, knowing that it has this unlawful purpose of possessing cocaine with an intent to distribute it.

And the third element is that there must be an overt act, that is, a single step by any member of the conspiracy, whether or not it is the defendants on trial, to carry out further the objects of the conspiracy.

Now, let me go to the second count.

The second count -- remember, I told you about the conspiracy; you never have to carry it out, as long as you make the agreement, join in it, and one step is taken to further it, that is the crime. Whether you ever succeed in selling cocaine or possessing cocaine is immaterial on the conspiracy count.

But on the second count, the defendants are charged with actually distributing cocaine and possessing cocaine with an intent to distribute it.

The first count is the illegal agreement. The

second count is actually doing it, and that is the thing that separates the first from the second count. They are distinct crimes.

So here the government has to show beyond a reasonable doubt these three facts: That on or about October 12th the defendants either distributed or possessed cocaine with an intent to distribute it. Either one of them is enough.

And the second element the government must establish is that the substance that was distributed, and which is in evidence here as Exhibit 1-B, is cocaine.

And there is a stipulation that if a chemist were called he would testify that he examined the contents of Exhibit 1-B and found that it was cocaine, adulterated with milk sugar.

The third element that the government must establish is that in distributing cocaine or in possessing cocaine the defendant knew what he was doing, that he acted knowingly and wilfully, that it wasn't some accident.

For example, suppose you are a bellboy working in a hotel and some man comes up and he gives you a suitcase and says, "Here, take this up to my room," and it is loaded with cocaine, but you don't know it. You are not guilty of any crime. But if you know it is cocaine and you possess

1 jkbr 15

2 it intentionally and deliberately, then you have committed
3 a crime.

4 And so here, the defendant has to know what he is
5 doing; he must do it intentionally.

6 So there, again, three elements here: That
7 the defendant possessed cocaine -- the defendant either
8 distributed cocaine or possessed cocaine with an intent to
9 distribute it.

10 Now, here the government says that Leamous made
11 a sale while they were in the bathroom there, and the
12 government asks you to infer that from circumstantial evi-
13 dence. That is the distribution that the government relies
14 on, and that is the possession the government relies on.

15 And as far as the defendant Fleming, the government
16 says he was in on this; he was able to control getting this
17 cocaine; he was able to set this deal up, so that Tezzano
18 could go there, and therefore he has what we call constructive
19 possession of it. That is what the government says,
20 because he was able to control the movement of the cocaine.
21 That is the government's theory.

22 Now, the defendants deny that. Obviously, they
23 deny it. And Fleming denies any knowledge of narcotics
24 on the stand here, and that is an issue that you have to
25 resolve. Who are you going to believe? It is up to you.

2 Now as to the third question you raise: "As far
3 as this case is concerned, can either defendant be convicted
4 of conspiracy and not of possession?" I would say no,
5 not on the evidence in this case, not on the evidence in
6 this case.

7 MR. WEISS: If your Honor please, may I have a
8 side bar?

9 THE COURT: Sure.

10 I should say, legally, as a technical matter,
11 you could, but it would be an inconsistent verdict on your
12 part. The jurors have a right to be inconsistent if they
13 want to be.

14 (At side bar.)

15 MR. WEISS: I was going to respectfully ex-
16 cept to that portion of your charge, finding on a conspiracy
17 and not on the possession, but in light of your explanation
18 to the jury and your clarification, I request that you instruct
19 the jury that the government must prove each element of
20 the conspiracy beyond a reasonable doubt.

21 For example, if they find that Tezzano and Brown
22 and/or Mangino had a conspiracy, that Fleming knew of the
23 existence of the conspiracy and that element must be proved
24 beyond a reasonable doubt.

25 THE COURT: I think I have made that perfectly

1 jkbr 17

2 clear and I am afraid I will just confuse it.

3 (In open court.)

4 THE COURT: As I told you in the charge proper,
5 and I think just now, there are three elements in the
6 conspiracy, three things; the agreement, knowing membership
7 and an overt act, and the government must prove all three
8 of those beyond a reasonable doubt, all three.

9 (At side bar.)

10 MR. WEISS: One other thing, your Honor,
11 only because you illustrated to the jury that Brown
12 testified that they went into the bathroom, I wish you
13 would remind the jury in marshalling this evidence that
14 Fleming denied that they went into the bathroom.

15 THE COURT: I told them that there was a con-
16 flict.

17 MR. WEISS: No, no, I said you marshalled the
18 evidence, you gave an illustration, and you said that Brown
19 testified they went into the bathroom and that is where it
20 happened. I am just reminding you of the conflict in the
21 testimony, that Fleming denied it. I think you highlighted
22 it.

23 (In open court.)

24 THE COURT: Counsel asked me to point out to
25 you that on the witness stand Fleming denied that these

1 jkbr 18

2 people, Tezzano and Leamous, went into the bathroom, so
3 you have the conflict between Brown's and Fleming's
4 testimony, and that is up to you to decide.

5 Is that satisfactory?

6 MR. WEISS: Thank you.

7 THE COURT: All right, retire for your deliber-
8 ations.

9 (Jury retired at 10:40 o'clock a.m.)